IN THE HIGH COURT OF JUDICATURE AT BOMBAY
CIVIL APPELLATE SIDE

APPEAL FROM ORDER NO.741 OF 2003
IN
SPECIAL CIVIL SUIT NO.66 OF 2003

Chandrakant Ramlal Choudhary
residing at Choudhari Wadi
village Bilalpada, Post: Waliv
Taluka- Vasai, Dist.:Thane-401208 ... Appellant

V/s.

1. Shyamprasad Zinkooram Choudhary
2. Smt.Rampatadevi Zinkooram Choudhary,
both residing at Choudhari Wadi
Village Bilalpada, Post: Waliv
Tal.: Vasai, Dist.:Thane-401208
3. Smt.Gulabi Bhagwan Panjwani
residing at Flat No.401,
Shubhsandesh Housing Society
16, Hansraj Lane, Byculla
Mumbai - 400 027 ... Respondents

Mr.R.P. Joshi with V.S. Kotikar for Appellant
Mr.Hemant Ghadigaonkar i/b Mr.A.D. Vidhwans for Respondents

CORAM: **SMT.NISHITA MHATRE, J.**

DATED: **NOVEMBER 24, 2004**

ORAL JUDGMENT:

. The Appeal from Order has been filed against the judgment of the Civil Judge, Senior Division, who has allowed the application filed under Exhibit 5 and granted temporary injunction restraining defendant No.2 who is appellant No.1 herein from running the quarry business on survey No.21/1 and 2, singlehandedly. The entire dispute has arisen because according to the plaintiff, the suit property formed part of the HUF

property established by one Zinkooram Choudhary who was the grandfather of Defendant No.2. The Plaintiff's claim that various properties which are listed in the application for ad-interim injunction were purchased by the Zinkooram Choudhary in the name of various members of his family. It appears that Zinkooram had married one Amra Zinkooram Choudhary who predeceased him leaving behind two sons Ramlal, Defendant No.1 and Shamlal who is also dead. After the death of his wife, Zinkooram married Plaintiff No.2. Plaintiff Nos.1 and 3 are the two issues from the second marriage.

2. The dispute has arisen because the plaintiffs claimed that all properties which are listed in the application are purchased by Zinkooram and Defendant No.2 does not own the properties listed at serial Nos.3 and 6 in the application.

3. Defendant No.2 claims to have been conducting the stone crushing business on these two properties at serial Nos.3 and 6 in the application since 1986. He claims that his father who was a partner in the Partnership firm known as M/s.Zinkooram Rajit & Co. had sufficient means to purchase properties enlisted at serial Nos.3 and 6 of the application. Defendant No.2 claims that after purchasing the properties these properties were gifted to him by his father and

therefore, he has been in possession of these properties and has been mining the same.

4. By the temporary injunction granted by the trial Court, Defendant No.2 has been restrained from conducting the quarry business on Survey Nos.21/1 and 2 in which respect he claims to have possession. The learned Advocate for Defendant No.2 who is the appellant No.2 herein has drawn my attention to certain documents which indicate that Defendant No.2 had declared the properties were in his name. Furthermore, he submits that there is no document on record which establishes the fact that Zinkooram had purchased these properties out of his own funds and that these properties were part of the family hotchpotch. The learned Advocate submits that unless the plaintiffs were able to show ownership rights or possessory rights in respect of the suit properties at serial Nos.3 and 6 of the application, no temporary injunction could have been granted against Defendant No.2 restraining him from quarrying the land. He relies on the judgments in *Mudigowda Gowdapa Sankh & Ors. v/s. Ramchandra Revgowda Sankh,* **AIR 1969 SC 1076** and *Srinivas Krishnarao Kango v/s. Narayan Devji Kango & Ors.,* **AIR 1954 SC 379** to submit that the burden of proof that the property belongs to the HUF is on the person alleging the same. The learned Advocate then submits that the relationship between Zinkooram and

Defendant No.2 being remote since Defendant No.2 was the grandson there could be a presumption that the property was joint property. He further relies on the judgment in *Gulabrao Maruti Bhagat v/s. Bhagwan Nana Bhagat & Ors.,* **(2001 (2) Mah.L.R. 754).**

5. Mr.Ghadigaonkar appearing for the Plaintiffs, the Respondents herein, submits that the properties are joint family properties and do not belong to Defendant No.2 alone. He submits that Zinkooram purchased various properties in the name of his family members and the properties at serial No.3 and 6 were two such properties purchased in the name of Defendant No.2. He submits that royalty in respect of the quarries has also been paid to the Collector in the name of the partnership and not by any individual. The learned Advocate then submits that in the case of *Hydroclave System Corporation & Anr. v/s. M/s.Jain Hydraulic Pvt. Ltd. & Ors.,* **2003 (1) ALL MR 54**, this Court held that once the lower Court had exercised its discretion to grant an injunction, the appellate Court should not substitute its discretion unless the discretion exercised by the Court below is found to be arbitrary or capricious or perverse or contrary to or in ignorance of settled principles of law. He submits that this is not a case where the trial Court has erred while granting temporary relief. He also places reliance on the judgment in the

case of *Rajendraprasad R. Singh & Ors. v/s. Municipal Corporation of Greater Bombay*, **2004 (1) Bom.C.R. 300** for the same proposition that the High Court should not ordinarily interfere with the discretionary jurisdiction of the trial Court.

6. On a consideration of the trial Court's judgment, I do not feel that the trial Court has considered certain aspects of the case. The trial Court has come to the conclusion that there was no documentary evidence to substantiate the fact that the joint family business was closed in 1997 as alleged by the plaintiff. The trial Court observed that the partnership known as M/s.Zinkooram Rajit & Co. is not a registered partnership under the Indian Partnership Act. According to the trial Court, Zinkooram was running the stone crushing business from the year 1962 and it was only in order to save taxes that the unregistered partnership document was executed. Furthermore, the trial Court has found that there is a deed executed on 18.3.1980 in which the purchaser's name is shown as Ramlal Zinkooram Choudhary who is Defendant No.1. Another document shows that the property was purchased in the name of Kamladevi Ramlal Choudhary, that is Defendant No.3. However, the third document shows the name of Defendant No.2. Although the deeds were registered on 18.3.1980, the trial Court has not accepted these purchases since

declarations were executed after nine months had elapsed. Moreover, the trial Court has observed that it would be unjust to permit Defendant No.2 to conduct the quarrying business alone.

7. Having heard the advocates for the parties at length, I am of the view that the trial Court did not consider the fact that the plaintiffs were not able to show prima facie that the properties at serial Nos.3 and 6 in the application for ad-interim relief were part of the joint family property. Instead, there were declarations to show that these properties were purchased by the defendants in 1980. Therefore, prima facie, it would appear that the plaintiffs have no right over these properties. The trial Court had erred in granting a temporary injunction.

8. However, in my view, it would be appropriate to permit Defendant No.2 to conduct the quarrying business from these two properties with some safeguards. Defendant No.2 pays royalty in respect of the quarrying business. On the basis of the royalty so paid, Defendant No.2 shall deposit 50% of the profits derived from quarrying. The amount will be deposited in Court by Defendant No.2 by the 10th of each month. This amount will be invested by the trial Court after every quarter in a nationalised bank initially for a period of

on eyear, to be renewed thereafter during the pendency of the suit. The Defendant No.2 and the Plaintiff No.1 shall take accounts on a day to day basis of the quarrying business and shall render accounts in Court on a quarterly basis.

9. Hearing of the suit is expedited.

10. Appeal from Order is disposed of in the above terms.